



**Information and Privacy  
Commissioner/Ontario**  
**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER P-1263**

**Appeal P-9600158**

**Ministry of the Attorney General**



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## **BACKGROUND:**

The appellant is a Police Officer employed by the York Regional Police Services Board (the Police). In 1992 and 1993, he was involved in an investigation relating to fraud and stock manipulation which arose following a dispute between the promoters of a publicly-traded company. As a result of the investigation conducted by the appellant, one of the promoters of the company (the primary affected person) was charged with the offence of obstructing justice under the Criminal Code.

During the investigation, the business premises operated by the company was searched pursuant to a search warrant and certain records were removed from its offices. Prior to the primary affected person coming to trial, the Crown Attorney responsible for the prosecution of this individual decided not to proceed with the charge and it was withdrawn in September 1993. The primary affected person then sought to recover the records which had been seized from the company's premises pursuant to the search warrant. He ultimately recovered possession of the seized documents in November 1993.

The appellant, as the investigating officer, was the subject of a series of complaints by the primary affected person. These complaints resulted in two separate investigations of the appellant under the Police Services Act (the PSA) by the Police and a further review by the Office of the Police Complaints Commissioner (the PCC). The appellant was exonerated of any allegations of wrongdoing.

## **NATURE OF THE APPEAL:**

On June 1, 1995, the appellant, through his Police Association, made a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all of the records relating to the PCC investigation which was undertaken in response to the complaints initiated by the primary affected person. Because the request predates the enactment of Bill 7, this appeal is subject to the law in effect prior to the Bill coming into force. In addition, the appellant has made another request to the Ministry of the Attorney General (the Ministry) for similar records relating to the Police investigation of the primary affected person's complaints. This request is now the subject of Appeal Number P-9600140.

In response to the request, the Ministry, on behalf of the PCC, located and identified a number of records totalling 801 pages as responsive to the request. In its original decision letter dated January 31, 1996, the Ministry, on behalf of the PCC, granted access to 294 pages in their entirety and withheld the remaining 516 pages, claiming the application of the following exemptions contained in the Act:

- law enforcement - section 14(2)(a)
- solicitor-client privilege - section 19
- discretion to refuse requester's own information - section 49(a)

The appellant appealed the PCC's decision to deny access to the 516 pages of records. During the mediation of the appeal, on June 4, 1996, the PCC issued a subsequent decision letter in which it granted access to 37 pages in full, and portions of three pages to the appellant. The PCC also raised the application of section 14(1)(a) (law enforcement), sections 15(b) and (c) (relations

with other governments), section 19 (with reference to records to which the exemption had not been applied in its January 31, 1996 decision letter) and section 21 (invasion of privacy).

There remain, accordingly, 476 pages and portions of three pages at issue in this appeal. The PCC treated the appellant's original requests as three separate requests, numbered 950291, 950292 and 950293. Records responsive to the first two parts of the request were numbered from 1 to 421. Records responsive to the third part of the request were numbered 1 to 386.

A Notice of Inquiry was provided to the appellant, the PCC and to three individuals whose interests might be affected by the disclosure of the records (the affected persons). In the Notice of Inquiry, the parties were requested to address the possible application of section 49(b) to the records. Representations were received from the appellant and the Ministry. The Notices of Inquiry sent to two of the affected persons were returned undelivered by Canada Post. No submissions were received from the primary affected person.

## **PRELIMINARY ISSUE:**

### **LATE RAISING OF DISCRETIONARY EXEMPTIONS**

Upon receipt of the appeal, this office provided the PCC with a Confirmation of Appeal notice. This notice indicated that the PCC had 35 days from the date of the notice, that is until May 17, 1996, to raise additional discretionary exemptions not claimed in its January 31, 1996 decision letter. No additional exemptions were raised during this period.

Subsequently, in its supplementary decision letter dated June 4, 1996, the PCC raised the application of the discretionary exemptions provided by sections 14(1)(a) and 15(b) and (c) and broadened the application of section 19 to include additional records not referred to in its original decision letter. In addition, the Ministry also claimed the application of the mandatory exemption in section 21 to a number of records.

It has been determined in previous orders that the Commissioner has the power to control the process by which the inquiry is undertaken (Orders P-345 and P-537). This includes the authority to set time limits for the receipt of representations and to limit the time during which an institution can raise new discretionary exemptions not claimed in its original decision letter.

The PCC was asked in the Notice of Inquiry to provide its reasons for claiming the discretionary exemptions after the expiration of the 35-day period and the reasons why the discretionary exemptions apply. In its submissions, the PCC states only that "Because of an oversight, staff in its office failed to claim the discretionary exemption set out in section 13(1)." The PCC did not make any representations to the reasons why it was late in claiming sections 14(1)(a) and 15(b) and (c) or its reasons for expanding the application of section 19 to include additional records.

In Order P-685, Inquiry Officer Anita Fineberg concluded that in cases where a discretionary exemption is claimed late in the appeals process, a decision-maker has the authority to decline to consider the discretionary exemption. I agree with Inquiry Officer Fineberg's reasoning and adopt it for the purposes of this appeal.

In the circumstances of this appeal, I am not persuaded that a departure from the 35-day time frame is justified. Accordingly, I decline to consider the application of sections 13(1), 14(1)(a) and 15(b) and (c) to the records. Nor will I consider the application of section 19 beyond those records to which it was applied in the PCC's January 31, 1996 decision letter. Because section 21 is a mandatory exemption, I will address its application to the records below.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. In general, the records at issue in this appeal concern the efforts made on the part of the primary affected person to encourage the PCC to investigate the conduct of the appellant both during the investigations being undertaken by his employer, the Police Service and after the Service had concluded its investigations. As such, I find that the records contain the personal information of the primary affected person and a number of other individuals.

Where information involves an examination of an individual's professional performance or an investigation into his or her conduct, these references are considered to be the individual's personal information [Order P-1180]. The views of the primary affected person which are contained in the records are critical of the appellant's conduct and the performance of his duties as a police officer. Accordingly, I find that the information contained in the records which relate to the investigations into the complaints against the appellant may properly be characterized as his personal information.

### **INVASION OF PRIVACY**

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access.

Under section 49(b) of the Act, where a record contains the personal information of both the appellant and other identifiable individuals and the PCC determines that the disclosure of the information would constitute an unjustified invasion of another individual's personal privacy, the PCC has the discretion to deny the appellant access to that information. In this situation, the appellant is not required to prove that the disclosure of the personal information would not constitute an unjustified invasion of the personal privacy of another individual. Since the appellant has a right of access to his own personal information, the only situation under section 49(b) in which he can be denied access to the information is if it can be demonstrated that the disclosure of the information would constitute an unjustified invasion of another individual's privacy.

Where, however, a record only contains the personal information of other individuals, section 21(1) of the Act prohibits the disclosure of this information unless one of the exceptions listed in the section applies. The only exception which might apply in the circumstances of this appeal is

section 21(1)(f), which permits disclosure if it "... does not constitute an unjustified invasion of personal privacy".

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of personal information would constitute an unjustified invasion of personal privacy. Where one of the presumptions found in section 21(3) applies to the personal information found in a record, the only way such a presumption against disclosure can be overcome is where the personal information falls under section 21(4) or where a finding is made that section 23 of the Act applies to the personal information.

If none of the presumptions contained in section 21(3) apply, the PCC must consider the application of the factors listed in section 21(2), as well as all other considerations which are relevant in the circumstances of the appeal.

The PCC submits that the documents containing personal information were compiled as part of an investigation into a possible violation of the PSA by the appellant. The PCC submits that the presumption contained in section 21(3)(b) applies to these records. This section states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,

was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The appellant submits that the disclosure of the records is desirable for the purpose of subjecting the activities of the Ministry to public scrutiny (section 21(2)(a)) and that the disclosure of the personal information is relevant to a fair determination of his rights (section 21(2)(d)). The remaining considerations from section 21(2) referred to by the appellant in his submissions favour privacy protection, rather than access to the requested information.

I have reviewed the submissions of the parties and the records at issue in this appeal which contain personal information and make the following findings:

1. Records 91 and 108 and the undisclosed portion of Record 241 from Requests 950291 and 950292 and Records 93, 94-96, 111, 117, 118 and 384-386 from Request 950293 contain only the personal information of one or more of the affected persons.

All of these documents were compiled by the PCC and are identifiable as part of a law enforcement investigation into a possible violation of the PSA following receipt of the complaints from the primary affected person. As such, I find that they fall within the presumption contained in section 21(3)(b).

2. Records 3-4, 5-6, 7-8, 9-10, 11-12, 13-15, 16-17, 19-21, 23-25, 27-31, 43-51, 52-54, 59-67, 71-72, 73, 77-81, 82-86, 88-89, 90, 105-107, 110, 111-112, 113, 114, 115, 124, 128-154, 167-170, 238-240, 255-258, 262-263, 265-266, 269-272, 273-275, 276-278, 279,

292, 293-295, 296-298, 299-301, 302-305, 306-307, 311-318, 319-324, 325-327, 333-339, 345-346, 347, 348, 349-350, 351-356, 358, 359, 360-361, 362-371, 377-379, 380-383, 384-388, 390-393, 394, 395-396, 397-398, 400-401, 402, 403, 404-405, 406-411, 412-420 from Requests 950291 and 950292, as well as Records 2-5, 6, 7-11, 14-15, 16-17, 23-24, 28-29, 30, 39-40, 69, 70, 71, 72-87, 88-91, 97-102, 103-104, 106, 107, 109, 112-115, 116, 121-122, 123-127, 131-139, 277-299, 300-338, 339-344, 345-347, 348-350, 351-353, 359-360 and 361-383 from Request 950293 contain the personal information of the appellant and one or more of the affected persons.

Again, all of these records were compiled by the PCC and are identifiable as part of a law enforcement investigation in a possible violation of the PSA by the appellant. I find, therefore, that these records fall within the presumption contained in section 21(3)(b).

3. Even if I were to find that the considerations under section 21(2) raised by the appellant were relevant and compelling, the Divisional Court's decision in the case of John Doe v. Ontario (Information and Privacy Commissioner) (1993) 13 O.R. 767 held that considerations under section 21(2) cannot be used to rebut the presumptions in section 21(3). Accordingly, the considerations raised by the appellant cannot overcome the application of section 21(3)(b). Section 21(4) of the Act does not apply, and the appellant has not argued that section 23 applies.
4. Records 91 and 108 and the undisclosed portion of Record 241 from Requests 950291 and 950292 and Records 93, 94-96, 111, 117, 118 and 384-386 from Request 950293 are, accordingly, exempt from disclosure under section 21.
5. Records 3-4, 5-6, 7-8, 9-10, 11-12, 13-15, 16-17, 19-21, 23-25, 27-31, 43-51, 52-54, 59-67, 71-72, 73, 77-81, 82-86, 88-89, 90, 105-107, 110, 111-112, 113, 114, 115, 124, 128-154, 167-170, 238-240, 255-258, 262-263, 265-266, 269-272, 273-275, 276-278, 279, 292, 293-295, 296-298, 299-301, 302-305, 306-307, 311-318, 319-324, 325-327, 333-339, 345-346, 347, 348, 349-350, 351-356, 358, 359, 360-361, 362-371, 377-379, 380-383, 384-388, 390-393, 394, 395-396, 397-398, 400-401, 402, 403, 404-405, 406-411, 412-420 from Requests 950291 and 950292, as well as Records 2-5, 6, 7-11, 14-15, 16-17, 23-24, 28-29, 30, 39-40, 69, 70, 71, 72-87, 88-91, 97-102, 103-104, 106, 107, 109, 112-115, 116, 121-122, 123-127, 131-139, 277-299, 300-338, 339-344, 345-347, 348-350, 351-353, 359-360 and 361-383 from Request 950293 are exempt from disclosure under section 49(b).
6. Record 162 from Requests 950291 and 950292 is a printout of an e-mail sent by the appellant. Record 120 from Request 950293 is a copy of a letter addressed to the appellant. As these records contain information which originated with or was received by the appellant and who is aware, therefore, of their contents, the denial of access to these documents would give rise to an absurd result [Orders M-384, M-444 and P-1091]. For this reason, I find that the disclosure of Record 162 from Requests 950291 and 950292 and Record 120 from Request 950293 would not result in an unjustified invasion of the personal privacy of any of the affected persons. These records should, accordingly, be disclosed to the appellant.

7. I further find that Records 18, 22, 26, the undisclosed portion of Record 39, Records 92, 95, 242-253, 254, 261, 264, 280, the undisclosed portion of Record 308, Records 357, 389 and 421 from Requests 950291 and 950292, as well as Records 25-27, 31, 43-51, 92, 105, 108, 110 and 119 from Request 950293 do not contain any personal information as defined by the Act.

As no other exemptions have been claimed for the undisclosed portion of Record 39, I find that it should be disclosed to the appellant. The PCC has claimed the application of various other exemptions for these documents, which will be addressed below.

## **LAW ENFORCEMENT REPORT**

The PCC submits that Records 18, 22, 26, 87, 92, 95, 280, the undisclosed portion of Record 308, Records 357, 389, 399 and 421 from Requests 950291 and 950292 along with Records 25-27, 31, 41-42, 43-51, 92, 105, 108, 110 and 119 are exempt from disclosure under section 14(2)(a) of the Act. In order for a record to qualify for exemption under section 14(2)(a), the PCC must satisfy each part of the following three part test:

1. the record must be a report; **and**
2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**
3. The report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

The word "report" is not defined in the Act. Based on previous orders, however, for a record to be a report, it must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

[Orders 200 and P-324]

Record 18 from Requests 950291 and 950292 is a file monitoring log. I find that it does not qualify as a "report" within the meaning of the Act. Records 22, 26, 87, 92, 95, 280, 357, 389, 399 and 421 from Requests 950291 and 950292 and Records 92 and 119 from Request 950293 consist of addressed envelopes, title pages and a telephone message. Clearly, records of this nature do not meet the definition of a "report" for the purposes of the Act. The undisclosed portion of Record 308 similarly does not satisfy the definition of a report.

Records 25-27 and 31 from Request 950293 are newspaper articles and as such, do not qualify as "reports" within the meaning of section 14(2)(a). Records 41-42 from Request 950293 consist of a schematic drawing of the primary affected person's former place of business while Records 43-51 are a court document. Again, records of this nature are not exempt from disclosure under section 14(2)(a). Records 105, 108 and 110 from Request 950293 consist of handwritten notes which passed between PCC staff during the course of the investigation of the complaints against the appellant. These records do not consist of any formal statement or account of the results of

the collation or consideration of information. Again, section 14(2)(a) has no application to these documents.

By way of summary, I find that the undisclosed portion of Record 308 and Records 18, 22, 26, 87, 92, 95, 280, 357, 389, 399 and 421 from Requests 950291 and 950292, along with Records 25-27, 31, 41-42, 43-51, 92, 105, 108, 110 and 119 from Request 950293 do not qualify for exemption under section 14(2)(a). As no other exemption has been claimed for these records, they should be disclosed to the appellant.

### **SOLICITOR-CLIENT PRIVILEGE**

The PCC has claimed the application of section 19 to Records 123, 125-127, 242-253, 254, 261 and 264 from Requests 950291 and 950292. None of these records contain the personal information of the appellant and section 49(a) does not, therefore, apply to them.

Section 19 consists of two branches, which provide the PCC with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The PCC has not made any submissions regarding the application of the exemption to Records 123, 125, 242-253, 254, 261 and 264. It argues that the document which comprises Records 126-127, a letter from counsel for the primary affected person to the Police, is subject to the section 19 exemption under Branch 1 as the record was created by counsel in contemplation of litigation.

I find that Records 126-127 qualify for exemption under Part 2 of Branch 1 of the solicitor-client privilege exemption. In this case, the document was created especially for counsel for the primary affected person for use in existing litigation, the ongoing dispute with the Police regarding the return of his client's seized records. I find that Records 126-127 qualify for exemption under section 19.

Records 242-253 consist of a Statement of Claim in an action involving the company which was the subject of the Police investigation. I find that section 19 has no application to such a record.

I have not been provided with sufficient evidence to make a finding that Records 123, 125, 254, 261 and 264 fall within the parameters of the section 19 exemption. Accordingly, I find that the exemption does not apply.

### **ORDER:**

1. I order the PCC to disclose to the appellant copies of the undisclosed portions of Records 39 and 308, Records 18, 22, 26, 87, 92, 95, 123, 125, 162, 242-253, 254, 261, 264, 280,



357, 389, 399 and 421 from Requests 950291 and 950292 as well as Records 25-27, 31, 41-42, 43-51, 105, 108, 110, 119 and 120 from Request 950293 by providing him with a copy by **October 21, 1996** but not before **October 24, 1996**.

2. I uphold the PCC's decision to deny access to the remaining records.
3. In order to verify compliance with the terms of this order, I reserve the right to require the PCC to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ September 19, 1996